Supreme Court, U.S.
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Case Number _____

UNITED STATES SUPREME COURT

October Term, 1994

GRACE INVESTMENT COMPANY, an Arizona Corporation; CANADIAN IMPERIAL BANK OF COMMERCE, a foreign corporation,

Petitioners,

versus

RED MOUNTAIN MACHINERY COMPANY,

Respondent.

PETITION FOR WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT CERTIORARI

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53 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can the State of Arizona's mechanics' lien statutes be involuntarily imposed against real property leases of Indian land?

2. Can the Court of Appeals find, as a matter of law, that the Secretary of the Interior specifically adopted Arizona's mechanics' lien law merely by approving a lease of Indian land, which does not refer to the lien statute and where the record does not show that the Secretary approved of or actually considered the matter?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit Court of Appeals were Plaintiff-Appellant Red Mountain Machinery Company ("Red Mountain") and Defendants-Appellees Grace Investment Company ("Grace") and Canadian Imperial Bank of Commerce.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, Petitioners Grace and Canadian Imperial Bank of Commerce state that they have no parent companies, subsidiaries or affiliates that have issued shares to the public.

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REPORTED OPINION

The opinion of the Ninth Circuit Court of Appeals in this case has been reported at 29 F.3d 1408 (9th Cir. 1994).

STATEMENT OF JURISDICTION

Judgment was entered by the Ninth Circuit Court of Appeals on July 18, 1994.

This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. 2101 (c) and Rule 10 United States Supreme Court Rules.

STATUTES AND REGULATIONS INVOLVED

Arizona State Constitution, Article 20, Paragraph 4.

Arizona's Mechanics' Lien Statute, A.R.S. § 33-981.

25 C.F.R. § 1.4(a).

25 C.F.R. § 162.9.

25 C.F.R. § 162.12.

25 U.S.C. § 415(a).

28 U.S.C. § 1322(b).

28 U.S.C. § 1360(b).

STATEMENT OF THE CASE

Grace entered into a lease agreement ("Lease") with the Yavapai-Prescott Indian Tribe (the "Tribe") whereby Grace was to develop a retail shopping center on the Tribe's land outside Prescott, Arizona. Canadian Imperial Bank of Commerce loaned the construction funds to Grace for the construction of the shopping center.

The Lease between the Tribe and Grace stated, as required by 25 C.F.R. § 162.9, that all construction materials at the time of their inclusion in the improvements became the property of the Tribe.

Red Mountain allegedly rented construction equipment to a subcontractor of Grace. This subcontractor allegedly used the rental equipment to perform its work on the shopping center. The subcontractor filed for bankruptcy and did not pay Red Mountain. After completion of the improvements by Grace, Red Mountain recorded a mechanics' lien under Arizona law against Grace's leasehold interest under the Lease. The lien named the Tribe as owner of the real property and the legal description was of the Tribe's property. (These allegations are taken as true for the purposes of this Petition only.) On October 22, 1991 Red Mountain filed suit in the state court of Arizona to foreclose its lien.

The State court action was removed to the United States District Court for the District of Arizona pursuant to 28 U.S.C. § 1441. The district court accepted jurisdiction under 28 U.S.C. § 1331 because the action involves an attempt to encumber and foreclose a leasehold interest of Indian land in violation of federal law.

The United States District Court for the District of Arizona granted Grace's Motion for Judgment on the Pleadings treating the same as a Motion for Summary Judgment. The district court found that the Lease was subject to federal law, that the Lease did not specifically adopt Arizona's mechanics' lien laws, and that there was no express approval of the Lease by the Secretary of the

Interior.

The district court, after discussing the relevant statutes and case law, declared that the federal law preempted the Arizona mechanics' lien law and granted Grace's Motion.

Red Mountain appealed, and the Ninth Circuit Court of Appeals reversed and remanded.

Grace and Canadian Imperial Bank of Commerce now file their Petition for Writ of Certiorari with this Court.

ARGUMENT AND AUTHORITIES

I. Importance.

This Petition concerns an important question of Indian law and federal preemption which should be settled by this Court. Whether Arizona can impose its mechanics' lien statutes against leases of Indian land is a question of first impression which takes on added significance in this era of increasing development and commercial activity on Indian land.

By its present decision, the Ninth Circuit Court of Appeals has violated or ignored state constitutional and federal statutes and regulation under which Arizona Indian tribes are governed for the purpose of allowing monetary compensation to a non-Indian subcontractor with bad credit policies.

The federal and state governments involved guaranteed to the Indian tribes of Arizona the sovereign rights of a foreign nation. However, the Ninth Circuit Court of Appeals has now joined a minority of other states in reneging upon such guarantees for the benefit of non-Indians. The parallel of this decision to the treaty-breaking excuses given the plains Indians of the 1800's, after precious minerals were found on their reservations, is obvious.

This Court has an obligation to prevent the proliferation of state-imposed laws for everything from automobile licenses to

sales taxes at the expense of the tribes and in derogation of their sovereignty.

II. The Regulation of Arizona Tribal Property.

All Indian property within the State of Arizona is absolutely protected and insulated from state regulation. Ariz. Const. art. XX, ¶ 4.

The Congress of the United States has developed a complete and pervasive system of laws and regulations governing the Indian tribes (see C.F.R. Title 25) and in particular, all real property interests of the Indian tribes. See 28 U.S.C.A. §§ 1322 and 1360. This was specifically acknowledged by the Ninth Circuit Court of Appeals in its decision. Red Mountain Mach. Co. v. Grace Inv. Co., 29 F.3d 1408 (9th Cir. 1994), 1410-11.

The Arizona mechanics' lien law, A.R.S. § 33-981, et seq., by its very language, affects only real property and improvements erected upon real property. The Arizona Constitution makes this law non-applicable to real property or any improvements thereon owned by an Arizona Indian tribe. The federal statutes broaden the prohibition against encumbrances on Indian property to any "interest" in real property.

Thus, the lien claim sought to be enforced upon the Lease is prohibited by both federal and state law.

III. The Decision of the Ninth Circuit Court of Appeals Is Factually Incorrect.

The Ninth Circuit Court of Appeals ignored the Arizona Constitutional prohibition and the prohibitions of federal law by declining to "enter the fray" concerning federal preemption and determined that the Secretary of Interior had already decided that issue against Grace when he approved the Lease. The court concluded that

> , . . . the lease between Grace and the Tribe which was approved by the Secretary, specifically adopts

> the Arizona mechanics' lien provision by providing that Arizona law would apply to controversies related to the Frontier Village project: . . .

29 F.3d at 1411.

The Ninth Circuit Court of Appeals further concluded that it need not engage in a preemption balancing analysis since

> . . . [T]he Secretary [of the Interior], pursuant to his statutory authority, has already engaged in such an analysis and has authorized the application of the mechanics' lien law under the terms of the lease between Grace and the Tribe.

Id. at 1410.

The Ninth Circuit Court of Appeals relied on two excerpts from Article 29 of the Lease to support its decision. Those excerpts provide:

> Lessor agrees that this Lease (as it applies to the subject property), and any encumbrances thereof, and any subleases, assignments or other contracted agreements with respect thereto (hereinafter collectively referred to as the "Legal Documents") shall be construed in accordance with the substantive law of the State of Arizona...
>
> . . . .
>
> Lessor agrees that any encumbrancer of Lessee's interest or that of any sublessee or assignee and the rights of any encumbrancer with respect thereto (including, without limitation, any rights dealing with any sale, foreclosure or other enforcement of (or under) any security instrument, or executed and delivered in connection therewith) may be governed by the laws of the State of Arizona or,

to the extent applicable, the laws of the United States. (emphasis added.)

(Lease at 42.)

The court below interpreted the term "encumbrance" as used in these provisions to include and authorize a mechanics' lien under Arizona law. This construction, however, is clearly wrong. The meaning of the term was previously established by Article 14 of the same Lease (entitled "Encumbrances") as action taken by the Lessee "for the purpose of borrowing for the development and improvement of the Leased Property" which "may be refinanced from time to time in Lessee's discretion" (Grace/Tribe Lease, at 23). Article 14 further provides that the Lessor and the Secretary shall approve the encumbrance instrument if it meets the requirements of the statutes and regulations (Grace/Tribe Lease at 24). Finally, the default provision of the Lease refers to the rights of "the encumbrancer (the holder of the beneficial interest under a deed of trust, an assignee under an assignment of lease as security, or a mortgagee)..." (Grace/Tribe Lease at 24).

It is therefore very clear that the term "encumbrance," as used in Articles 14 and 29 of the Lease, refers to consensual liens granted to obtain financing and not to involuntary encumbrances such as the application of the Arizona mechanics' lien statutes.

Subsection (c) of 25 C.F.R. § 162.12 clearly limits the type of encumbrance contemplated and authorized, i.e., a voluntary encumbrance undertaken for financing purposes. The involuntary encumbrance created by a mechanics' lien does not meet this requirement.

The regulation cited by the Ninth Circuit Court of Appeals contains the additional proviso that the "encumbrance instrument" must be approved by the Secretary of the Interior. While such a requirement is appropriate in the context of a mortgage or deed of trust, it cannot plausibly refer to a simple mechanics' lien form, the contents of which are dictated entirely by state statute. It must therefore be concluded that the imposition of Arizona mechanics'

lien law is directly contrary to 25 C.F.R. § 162.12.

The Ninth Circuit Court of Appeals also concluded erroneously that Article 29 of the Lease specifically adopted the Arizona mechanics' lien statutes. 1408 F.3d at 1411. As a matter of fact, the Lease does not refer to these statutes or to mechanics' liens at all.

Section 1.4 of 25 C.F.R. requires the Secretary or "his authorized representative" to adopt state law to Indian lands. 25 C.F.R. § 162.12(a) defines the Secretary's authorized representative as one who acts "under delegated authority." In fact, the Lease is not signed by the Secretary of Interior; it is signed by the acting Phoenix Area Director of the Bureau of Indian Affairs, as specifically found by the district court.[1]

There is no evidence that the acting director of the Phoenix Area of the Bureau of the Indian Affairs was delegated the authority to adopt Arizona law or approve the lease. There is no evidence that the Secretary of the Interior ever read, or even considered, the intricacies of the Lease *vis a vis* the Arizona mechanics' lien law.

Matters impinging on the delicate interplay between competing governmental interests should not be determined by inadvertence or caprice. If the Secretary actually intends to adopt state law, he should do so in forthright fashion. See, e.g., the action of the Secretary in adopting California zoning laws under 25 C.F.R. § 1.4(b), while explicitly choosing not to adopt or make applicable local zoning ordinances. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), citing 30 Fed.Reg. 8722.

Even where it is argued that the Secretary took action through approval of one particular lease, a court should require an explicit statement clearly reflecting such intent. In Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983), the Tribe argued

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[1] Although apparently no one took care enough to notice that the Area Director's acknowledgment was not completed by filling in the information regarding delegation of authority.

Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983), the Tribe argued that it had the unilateral right to terminate a lease, despite contrary regulations, because the document approved by the Secretary stated that the Tribe "and/or" the Secretary could terminate the lease. The court rejected that contention, indicating that such important issues should not turn on inferences of tacit approval arising from lease clauses which need not necessarily be read in the manner suggested by the proponent. Therefore, the lynch-pin assumptions of federal approval and inclusion engaged in by the Ninth Circuit Court of Appeals are baseless.

In this case, it was pure speculation on the part of the Ninth Circuit Court of Appeals that the Secretary approved the lease; specifically adopted the Arizona mechanics' lien law; or balanced the federal, state, and tribal interests.

IV. Indian Law Preemption Standards.

The Ninth Circuit Court of Appeals refused to consider the matter of preemption directly, ignored the serious aspects of preemption as they apply to Indian law, and treated the case as one of simple contract.

Because of the unique issues involved in Indian history and sovereignty, this Court has specifically determined that preemption questions should not be decided by traditional standards developed for other areas of the law. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). As a result, an express congressional statement of preemption is unnecessary to establish that a particular state law is preempted by operation of federal law. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

When a state attempts to assert authority over non-Indians engaged in activities on the reservation, difficult questions arise which require scrutiny of the relevant federal statutes in order to balance the underlying policies and notions of sovereignty that have developed from historical traditions of tribal independence. Bracker, 448 U.S. at 144-145, 100 S.Ct. at 2584. Any ambiguities

traditional notions of sovereignty and with the federal policy of encouraging tribal independence. Id.

Preemption questions are not controlled by mechanical or absolute conceptions, but require flexible analysis sensitive to the particular facts and legislation involved. Cotton Petroleum, supra. The determination requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." Dept. of Taxation & Finance of New York v. Milhelm Attea & Bros., ___ U.S. ____, 114 S.Ct. 2028, 2035 (1994), quoting Bracker, 448 U.S. at 142, 100 S.Ct. at 2583.

V. Application Of The Arizona Mechanics' Lien Law Is Incompatible With Federal Law And Must Be Held Preempted.

A. Leasing on Indian Land Is Subject To Pervasive Federal Regulation.

As noted by the Ninth Circuit Court of Appeals this area of law is subject to pervasive federal regulation. 1408 F.3d at 1411, fn. 2. In three leading cases, this Court has held that state law was preempted from application to transactions between Indians and non-Indians based on the pervasive nature of the federal involvement. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (concerning motor carrier license and fuel taxes charged to non-Indian corporations that conducted logging operations on the Fort Apache Reservation); Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982) (concerning imposition of a tax on the gross receipts of a non-Indian construction company hired by the Tribe to build a school on the reservation); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (concerning New Mexico's hunting and fishing laws). The instant case involves the leasing of tribal land which is governed by a federal regulatory scheme similar to that in Bracker, supra.

In addition to the detailed regulations governing terms of

In addition to the detailed regulations governing terms of leasing, 25 C.F.R. § 1.4(a) establishes the policy of the federal government regarding state regulation of property leased from Indian tribes as follows:

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.[2]

25 C.F.R. § 1.4(a) (1993).

The broad federal involvement in all aspects of Indian land leasing demonstrates that there is no room for additional regulation by the state.

B. The Arizona Mechanics' Lien Law Conflict With Federal Regulations and Interests.

In addition to the comprehensive nature of the federal regulatory scheme, a court must consider the potential conflict between the federal or tribal law and the regulatory authority which the state seeks to impose. New Mexico v. Mescalero Apache Tribe, supra. The Court of Appeals for the Tenth Circuit recently ruled that the Oklahoma statutes governing oil and gas royalty payments were preempted in view of the conflicting and comprehensive federal

[2] Paragraph (b) of this regulation allows the Secretary to specifically adopt state law in certain circumstances, further demonstrating the degree of federal control over such matters. Of course, Grace contends that the Secretary in this case did not in fact choose to adopt Arizona mechanic's lien law, as discussed supra.

Company, 25 F.3d 920 (10th Cir. 1994). In that case, the Indian Mineral Leasing Act, 25 U.S.C. § 396a-396g, required the Secretary of the Interior to approve leases, require performance bonds, and oversee lease operations, while the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1701-1757, authorized the Secretary to establish a royalty management system. The Secretary promulgated regulations concerning leases on Indian lands that the court viewed as comprehensive and as giving wide powers to the Secretary over all aspects of the leasing arrangement. Oklahoma's royalty statute was held preempted because it was incompatible with and interfered with the Secretary's interest in enforcing the federal regulations regarding late payments and penalties.

In the instant case, the Ninth Circuit Court of Appeals acknowledged that "leases of tribal land are governed by a complex federal statutory and regulatory scheme," 29 F.3d at 1410, but failed to recognize that the imposition of a mechanics' lien under Arizona law directly contradicted the relevant federal regulations.

C. The Arizona Mechanics' Lien Law Is Incompatible With Tribal Interests.

The Ninth Circuit Court of Appeals concluded that

> . . . [E]nforcement of Red Mountain's mechanic's lien in this case does not harm any economic interest of the Tribe or interfere with Tribal property interests or any interest in self-government.

29 F.3d at 1412.

and that

> the application of the mechanic's lien provision is consistent with a strong federal interest in promoting economic development on Indian lands.

Id.

The court rationalized that requiring Grace to pay Red Mountain would not affect the Tribe's rental income because construction costs are not included in the calculation of gross income used to determine additional percentage rent under the Lease.

The Ninth Circuit Court of Appeals' evaluation of the Tribe's interest was far too narrowly focused. Certainly, the potential for tribal monetary loss has been a factor in preemption cases dealing with taxation of business operations conducted on Indian land, e.g., Bracker, supra; Ramah Navajo School Board, supra; and Cotton Petroleum, supra. However, the nature of the tribal interest will naturally vary with the type of state law sought to be imposed. Thus, in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983), the main consideration related to Indian sovereignty and the tribe's right to regulate hunting and fishing on the reservation free from state interference. In Segundo v. City of Rancho Mirage, 113 F.2d 1387 (9th Cir. 1987), the court emphasized that enforcement of local rent control ordinances would necessarily preclude enforcement of a conflicting tribal ordinance, effectively negating the Tribe's authority to regulate the use of its lands.

In this case too, the Yavapai-Prescott Tribe has a strong interest in preventing Arizona from attempting to regulate construction on Indian land. The Tribe is fully capable of judging the desirability of enacting Tribal ordinances securing payment to construction workers (some of whom may be Tribal members as a result of Lease Article 48 establishing Indian preference in employment) and determining the most appropriate way of doing so.

The analysis of tribal interests must also consider the qualitative aspect of Indian participation in the reservation activity at issue. This Court has given greater weight to tribal interests which concern "value generated on the reservation by activities involving the Tribes," as opposed to the "modest" tribal interest at stake in many preemption cases, where the Tribe is merely selling tax-exempt products to nonmembers who do not receive significant tribal services. Dept. of Taxation & Finance, supra, citing

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). See also Mescalero Apache, supra, involving tribal enterprise to develop recreation area, and California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), prohibiting application of California regulatory authority over reservation bingo games.

In this case, the Tribe entered into a long-term Lease with Grace for the development of multiple use facilities, including retail, office, residential and recreational usages. The Ninth Circuit Court of Appeals acknowledged that the Tribe's benefits from the Lease were not limited to rental income, but also produced increased employment opportunities for tribal members and the development of facilities on tribal land that enhance the quality of life. 29 F.3d at 1412, fn. 5. Yet, the court did not give these tribal interest factors the weight they deserved. Ironically, the Ninth Circuit Court of Appeals overlooked its own decision expressed two years earlier in Gila River Indian Community v. Waddell, supra, to wit:

> That a tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference . . . . "

967 F.2d at 1410.

If the Tribe so chooses, it has the absolute sovereign right to have Grace, and no one except Grace, be the lessee. The Tribe should not be forced to accept the high bidder at some foreclosure sale as its new long-term lessee.

The various states in the United States more and more often now are eyeing the property of the Indian Tribes not for the good the states can do for the indians but for the good the indians can do for the non-indians and their state governments. Numerous cases seek revenues from operations on Indian land not so that the monies can help the Indian but that the monies can help the non-Indian line his own pockets. So too, in this case, is the non-Indian

rewarded for his own folly while the Tribe rights are ignored.

These states, sometimes with the help of the federal and state courts, ignore the sovereignty of the Indian tribes as assured by the federal government and impose laws on the citizens of what is legitimately a separate sovereign nation. Laws that the tribes never sought, and in most cases do not want, because they interfere with self government and economic benefit.

D. The State of Arizona Has No Cognizable Interest In This Matter.

The Ninth Circuit Court of Appeals did not justify its decision in this case by reference to any interest of the State of Arizona. Indeed, the record cannot support any conclusion that the interests of Arizona are sufficient to justify the assertion of state authority.

In Indian preemption analysis, a party cannot establish the existence of a sufficient state interest simply by showing that the state regulation is appropriate for the state as a whole, e.g., the desirability of certain hunting regulations, or merely by referring to the general purpose for which the law was passed, e.g., the state's general interest in taxing to raise revenue. Rather, the exercise of state authority must be justified by regulatory functions or services performed by the state in connection with the on-reservation activity. Mescalero Apache Tribe, 462 U.S. at 335, 103 S.Ct. at 2387, citing Ramah Navajo School Board and Bracker. Accord, Cotton Petroleum, supra (noting the district court's finding that New Mexico regulated the spacing and mechanical integrity of wells located on the reservation and provided substantial services to the Jicarilla Tribe and the non-Indian lessee at a cost of three million dollars per year); cf. Gila River Indian Community v. Waddell and Coosewoon v. Meridian Oil Company, supra.

In this case, no evidence was submitted regarding Arizona's involvement, if any, in the development and operation of the Frontier Village Shopping Center. As no findings on this issue were made by either of the lower courts, there is no foundation for the

argument that Arizona has a legitimate interest justifying the application of its mechanics' lien law in this situation.

VI. Conclusion.

The Ninth Circuit Court of appeals decision is fatally flawed by the unsubstantiated assumption of authorized approval of the lease by the Secretary of the Interior and inclusion of Arizona mechanics' lien laws into the Lease.

Since the inclusion of the Arizona laws is not supported, the traditional preemption analysis supports the conclusion of the United States District Court's decision and not that of the Ninth Circuit Court of Appeals' decision.

Application of Arizona's mechanics' lien law to the Lease in question is factually, legally and morally wrong.

The Ninth Circuit Court of Appeals decision must be reversed in order to protect the sovereignty of the Tribe, promote the economic ends of Indian development and serve the higher, historical goals of Indian Law.

RESPECTFULLY SUBMITTED this 15th day of October, 1994.

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RED MOUNTAIN MACHINERY COMPANY, an Arizona corporation,
Plaintiff-Appellant,

v.

GRACE INVESTMENT COMPANY, an Arizona corporation; CANADIAN IMPERIAL BANK OF COMMERCE, a foreign corporation,
Defendants-Appellees.

No. 92-16825
D.C. No.
CV-91-01840-CAM
OPINION

Appeal from the United States District Court
for the District of Arizona
C.A. Muecke, Senior District Judge, Presiding

Argued and Submitted
February 9, 1994—San Francisco, California

Filed July 18, 1994

Before: Betty B. Fletcher, Alex Kozinski and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Fletcher

SUMMARY

Government Law/Native Americans/Business Law

The court of appeals reversed a district court order and remanded. The court held that, in an action seeking to enforce

a mechanics' lien against a non-Indian's leasehold interest in tribal land, federal law did not preempt application of a state mechanics' lien statute.

Appellee Grace Investment Co. leased tribal lands from the Yavapai-Prescott Indian Tribe to construct and operate a shopping center. The lease was entered into in compliance with federal laws governing the leasing of Indian lands, and was approved by the Secretary of the Interior. Under the lease, Grace was responsible for paying the cost of all construction on the shopping center project. In addition, under both federal regulations and the terms of the lease, Grace was required to provide security to guarantee completion of the project and payment in full of the claims of those who performed work on or provided materials to the project. In compliance with this requirement, Grace entered into a construction loan agreement with appellee Canadian Imperial Bank of Commerce. The lease also provided that Arizona law would apply to controversies related to the shopping center project, and that disputes between Grace and other non-Indian parties that might affect Grace's leasehold interest could be subject to state law.

Grace began construction of the project, and entered into a subcontract with Tempe Trenching Co. for the construction of water and sewer systems. Tempe contracted with appellant Red Mountain Machinery Co. to rent equipment necessary for Tempe to carry out its subcontract with Grace. At the conclusion of work on the project, Tempe owed Red Mountain unpaid rental charges. Without paying the charges, Tempe filed for bankruptcy.

Red Mountain recorded a Notice and Claim of Lien pursuant to Arizona's mechanics' lien law. Red Mountain filed an action in state court seeking to enforce the mechanics' lien against Grace's leasehold interest in the real property leased by Grace from the Tribe. The complaint did not seek to foreclose upon the underlying real estate, nor did it name the

Tribe as a defendant. The case was removed to the district court. The district court entered summary judgment for Grace, ruling that the Arizona lien law is preempted by federal statutory and regulatory control of leases involving Indian land. Red Mountain appealed.

[1] The Secretary authorized the application of the mechanics' lien law under the terms of the lease between Grace and the Tribe. [2] The extensive regulatory scheme governing leases of tribal land explicitly permits leases of tribal land to be encumbered if the lease contains a provision authorizing such an encumbrance. The lease between Grace and the Tribe, which was approved by the Secretary, specifically adopted the Arizona mechanics' lien provision by providing that Arizona law would apply to controversies related to the shopping center project. [3] The substantive law of Arizona confers upon parties such as Red Mountain that supply materials to construction projects the right to impose and enforce a mechanics' lien against a lessee's interest in the underlying property. In this case, by approving the lease, the Secretary contemplated and authorized enforcement of mechanics' liens by foreclosure against the leasehold pursuant to Arizona law.

[4] Whether the lien was valid and could be foreclosed were questions for the district court on remand.

COUNSEL

Lawrence C. Wright, Mesa, Arizona, for the plaintiff-appellant.

G. Gregory Eaglebuger, The Eagleburger Group, Phoenix, Arizona, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

Red Mountain Machinery Company ("Red Mountain") appeals the district court's order granting summary judgment in favor of Grace Investment Co. ("Grace") and the Canadian Imperial Bank ("the Bank") in Red Mountain's action seeking foreclosure of a leasehold interest in real property leased by Grace from the Yavapai-Prescott Indian Tribe ("the Tribe"). The district court held that the Arizona mechanics' lien law was preempted by federal law. We reverse and remand.

BACKGROUND

The facts are undisputed. Grace is an Arizona corporation engaged in real estate investment and development. By a lease dated October 7, 1988, Grace leased tribal lands from the Yavapai-Prescott Indian Tribe to construct and operate the Frontier Village shopping center. The Yavapai-Prescott Indian Tribe is a federally recognized and protected Indian Tribe. The lease was entered into in compliance with federal laws governing the leasing of Indian lands. *See* 25 U.S.C. § 415(a) (Supp. IV 1992); 25 C.F.R. pt. 162 (1993). The lease has a term of sixty-five years and contains an option to renew for an additional twenty-year period. The lease was approved by the Secretary of the Interior, through the Acting Phoenix Area Director of the Bureau of Indian Affairs.

The purpose of the lease was to facilitate the development of multiple-use facilities on tribal land, including retail, office, lodging, medical, residential, and recreational buildings. The lease granted Grace continued possession of the property for the term of the lease. Grace was responsible for paying the cost of all construction on the Frontier Village project. In addition, under both federal regulations and the terms of the lease, Grace was required to provide security to guarantee completion of the project and payment in full of the

claims of those who performed work on or provided materials to the project. In compliance with this requirement, Grace entered into a construction loan agreement with the Bank (the "Building Loan Agreement") under which the Bank agreed to advance an amount sufficient to cover the entire cost of construction. The Building Loan Agreement provided that all funds lent by the Bank were to be used only to pay the costs of construction and direct expenses of project development. As a condition for each construction advance, Grace was required to present evidence that it had paid for all work and materials previously supplied to the project. The Building Loan Agreement provided that Grace would be in default of the Agreement if Grace failed to discharge any mechanics' lien that might arise on the project.

After the lease was executed, Grace began construction of the Frontier Village Center. In February 1991, Grace entered into a subcontract with Tempe Trenching Company ("Tempe") for the construction of water and sewer systems. In April 1991, Tempe contracted with Red Mountain to rent equipment necessary for Tempe to carry out its subcontract with Grace.

At the conclusion of its work on the Frontier Village project, Tempe owed Red Mountain $55,872.14 in unpaid rental charges. Without paying these charges, Tempe went out of business and subsequently filed a "no asset" Chapter 7 bankruptcy. Tempe is not a party to this action.

On September 11, 1991, Red Mountain recorded a Notice and Claim of Lien pursuant to Arizona's mechanics' lien law. Ariz. Rev. Stat. Ann. § 33-981 (1990).[1] It claimed $55,872.14

[1]The Arizona law provides, in relevant part:

A. . . . [E]very person who labors or furnishes professional services, materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improve-

and listed the Tribe as the owner of the property and Grace Investment Company as lessee. The legal description of the real property was attached to the notice. The lien was claimed on the real property and improvements.

On October 22, 1991, Red Mountain filed this action in state superior court seeking to enforce the mechanics' lien against Grace's leasehold interest in the real property leased by Grace from the Tribe. The complaint named Grace and the Bank as defendants. The Bank was joined as a defendant because it holds a mortgage on Grace's leasehold estate. The complaint did not seek to foreclose upon the underlying real estate, nor did it name the Tribe as a defendant.

This case was properly removed to federal court pursuant to 28 U.S.C. § 1441. On August 24, 1992, the district court entered summary judgment for Grace, ruling that the Arizona lien law is preempted by federal statutory and regulatory control of leases involving Indian land. Red Mountain filed a motion to amend the judgment on September 4, 1992. This motion was denied on September 11, 1992. Red Mountain timely appealed to this court.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over this claim pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

A grant of summary judgment is reviewed de novo. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 1992); *T.W.*

> ment whatever, shall have a lien on such building, structure or improvement for the work or labor done or professional services, materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent. . . .

Ariz. Rev. Stat. Ann. § 33-981 (1990).

appellees argue that federal preemption is appropriate under either the traditional standards for federal preemption or under those standards that have developed in Indian law cases.

[1] Interesting as this dialogue may be, we need not enter the fray. Although we ordinarily would apply a fact-specific balancing test among federal, state, and tribal interests to determine if a state law applies in a given case, *see White Mountain Apache Tribe*, 448 U.S. 136, in this case we conclude that we need not engage in such a balancing test because the Secretary, pursuant to his statutory authority, has already engaged in such an analysis and has authorized the application of the mechanics' lien law under the terms of the lease between Grace and the Tribe.

Leases of tribal land are governed by a complex federal statutory and regulatory scheme. Federal law permits the Yavapai-Prescott Tribe to enter into long-term leases of their land, and to renew those leases once, as prescribed, for a number of years. 25 U.S.C. § 415(a) (Supp. IV 1992). All leases and renewals must be made according to detailed regulations promulgated by the Secretary of the Interior, and each lease or renewal requires the Secretary's approval. *Id.* Pursuant to this statutory grant of authority, the Secretary has promulgated detailed regulations governing the leasing of tribal lands. 25 C.F.R. pt. 162 (1993).

[2] The extensive regulatory scheme governing leases of tribal land explicitly permits leases of tribal land to be encumbered if the lease contains a provision authorizing such an encumbrance. 25 C.F.R. § 162.12(a) & (c) (1993).[3] In accor-

[3]Section 162.12 provides, in relevant part:

> (a) Except as provided in paragraphs (b), (c), and (d) of this section, a sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit . . . .

Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir. 1987). Because there is no dispute with respect to the underlying facts, we must determine whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

DISCUSSION

This case raises the question of whether a state law of general applicability, the Arizona mechanics' lien statute, may be applied to allow foreclosure of a leasehold interest in tribal land held by a non-Indian. On a number of occasions the Supreme Court has addressed whether state laws apply to regulate non-Indians conducting business on Indian reservations. The Court has repeatedly emphasized that "no rigid rule" governs such an exercise of state authority. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Instead, the Court has stated that we must assess on a case-by-case basis "two independent but related barriers to the assertion of state regulatory authority over tribal reservations": (1) federal preemption, and (2) tribal self-government. *Id.* at 142-43. Either barrier standing alone can be "a sufficient basis for holding state law inapplicable to activity undertaken on the reservation." *Id.* at 143.

At the outset, the parties disagree about the proper standard to apply to determine if the Arizona mechanics' lien law is preempted. Red Mountain argues that the principles of federal preemption in the area of Indian law are *sui generis* and that traditional standards of preemption do not apply.[2] In contrast,

[2]Outside the specific area of Indian law, federal law is held to preempt state law when (1) federal law expressly states that it preempts state law; (2) the federal scheme of regulation is so pervasive that it is reasonable to infer that Congress intended preemption; or (3) state law conflicts with federal law or stands as an obstacle to the accomplishment of Congress's full purposes. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 111 S. Ct. 2476, 2481-82 (1991).

dance with this regulatory provision, the lease between Grace and the Tribe, which was approved by the Secretary, specifically adopts the Arizona mechanics' lien provision by providing that Arizona law would apply to controversies related to the Frontier Village project:

> *Lessor agrees that this lease . . . and any encumbrances thereof,* and any subleases, assignments or other contracted agreements with respect thereto *. . . shall be construed in accordance with the substantive law of the State of Arizona . . . .*

Lease at 42 (emphasis added). The lease also provides that disputes between Grace and other non-Indian parties that might affect Grace's leasehold interest may be subject to state law:

> *Lessor agrees that any encumbrancer of Lessee's interest or that of any sublessee or assignee and the rights of any encumbrancer with respect thereto* (including, without limitation, any rights dealing

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. . . .

(c) *With the consent of the Secretary, the lease may contain provisions authorizing the lessee to encumber his leasehold interest in the premises for the purpose of borrowing capital for the development and improvement of the leased premises. The encumbrance instrument[ ] must be approved by the Secretary.* If a sale or foreclosure under the approved encumbrance occurs and the encumbrancer is the purchaser, he may assign the leasehold without the approval of the Secretary or the consent of the other parties to the lease, provided, however, that the assignee accepts and agrees in writing to be bound by all the terms and conditions of the lease. If the purchaser is a party other than the encumbrancer, approval by the Secretary of any assignment will be required, and such purchaser will be bound by the terms of the lease and will assume in writing all the obligations thereunder.

25 C.F.R. § 162.12(a) & (c) (1993) (emphasis added).

> with any sale, foreclosure or other enforcement of (or under) any security instrument, or executed and delivered in connection therewith) *may be governed by the laws of the State of Arizona* or, to the extent applicable, the laws of the United States.

Lease at 43-44 (emphasis added).

[3] As noted above, the substantive law of Arizona confers upon parties such as Red Mountain that supply materials to the construction projects the right to impose and enforce a mechanics' lien against a lessee's interest in the underlying property. Ariz. Rev. Stat. Ann. § 33-981 (1990); *Demund Lumber Co. v. Franke,* 14 P.2d 256 (Ariz. 1932) (noting that where an owner of property has leased land to a developer, a party that furnishes material to the lessee may have a lien only against the lessee unless the lessee is an agent of the owner). We conclude that by approving the lease that contained these provisions, the Secretary contemplated and authorized enforcement of mechanics' liens by foreclosure against the leasehold pursuant to Arizona law.

In addition to the language in the lease, federal regulations require a lessee of tribal lands to provide assurances that the claims of subcontractors and suppliers who contribute their labor and materials to a development project on such lands will be paid. *See* 25 C.F.R. § 162.5(c) (1993). In this case the lease was the instrument that satisfied this requirement by requiring Grace to guarantee completion of the project and payment of the workers and materialmen by providing one of four types of security. One option available to Grace was to deposit cash in escrow "until the period fixed by law for the filing of all mechanics' or materialmen's liens on such improvement shall have expired." Lease at 15. This language further substantiates our conclusion that the Secretary recog-

nized that mechanics' liens could be filed against the leasehold and sought to guard against the consequences.[4]

In summary, we conclude that the federal government has already balanced the federal interests, state interests, and tribal interests. Although it is not our job to weigh the federal, state, and tribal interests in a case such as this where the Secretary has already done so, we emphasize that application of the mechanics' lien provision is consistent with a strong federal interest in promoting economic development on Indian lands. Ensuring that labor and materialmen and lenders who make possible development projects on tribal lands can take security to enable them to be paid promotes that development. Congress first authorized the long-term leasing of Indian lands in order to bring Indians much needed income that they could not receive under short-term leases. 25 U.S.C. § 415(a); H.R. Rep. No. 1093, 84th Cong., 1st Sess., 2691, 2692 (1955).[5] Federal regulations promote this policy by ensuring that suppliers and contractors who contribute to the development of tribal lands are paid. 25 C.F.R. § 162.5(c) (1993).

We also emphasize that enforcement of the mechanics' lien in this case does not harm any economic interest of the Tribe or interfere with Tribal property interests or any interest in

[4]We also note that the Building Loan Agreement between Grace and the Bank specifically contemplates that mechanics' liens might be filed against Grace's leasehold interest in the Tribe's property. The Building Loan Agreement provides that as a condition to receiving each construction advance from the Bank, Grace was required to provide evidence that it had paid for all work and materials previously supplied to the project. The Agreement further provided that Grace would be in default under the Agreement if it failed to discharge any liens that might arise on the project.

[5]Some of the benefits that the Tribe receives from its lease with Grace include substantial rental income, increased employment opportunities for members of the Tribe at the Frontier Village Center, the development of facilities on Tribal land that enhance the quality of life, and the return to the Tribe of possession of the property with all improvements when the term of the lease expires.

self-government. In entering the lease agreement, the Tribe conveyed its possessory interest in the land for a designated period of time, retaining a reversionary interest in the land. The mechanics' lien applies only to Grace's leasehold interest in the property, and not to the underlying property itself. *See Demund Lumber*, 14 P.2d 256. Because Red Mountain's claim may be asserted only against Grace, and because it does not affect the Tribe's reversionary interest in its property, no tribal interest will be harmed.[6]

Red Mountain requests an award of attorneys' fees pursuant to Ariz. Rev. Stat. Ann. § 33-998(B), which permits an award of reasonable attorneys' fees to a successful party in an action to enforce a lien.[7] Appellees argue that § 33-998(B) does not support an award of attorneys' fees in this case because the statute was not enacted until after Red Mountain filed its complaint and did not become effective until after the district court dismissed the action.

[4] We do not decide whether attorneys' fees may be awarded under § 33-998(B) in cases that were pending at the time this provision became effective because this issue is not properly before us. The only issue on appeal is whether federal law preempts the application of the Arizona mechanics' lien provision to the leasehold interest held by Grace.

[6]We also note that requiring Grace to pay Red Mountain will not affect the annual rental income that the Tribe receives under the lease. This rental income from the lease is based in part on sales revenue from the leased property, and is calculated by adding to an annual stipulated base rent a percentage of the portion of Grace's gross income that exceeds the annual base rent. Costs of construction, which would include the cost of paying Red Mountain's claim, must be paid by Grace and are not included in the calculation of gross income.

[7]Section 33-998(B) provides:

> In any action to enforce a lien granted under this article, the court may award the successful party reasonable attorney fees.

Ariz. Rev. Stat. Ann. § 33-998(B) (Supp. 1993).

Whether the lien is valid and may be foreclosed are questions for the district court on remand. After the district court decides these issues, it can then determine whether Red Mountain is a successful party and whether it is appropriate to award reasonable attorneys' fees under § 33-998(B) under the facts of this case.

CONCLUSION

We hold that federal law does not preempt application of the Arizona mechanics' lien provision to the leasehold interest held by Grace. The district court's order granting summary judgment for Grace is REVERSED and this case is REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RED MOUNTAIN MACHINERY COMPANY,
PLAINTIFF

vs.

GRACE INVESTMENT CO., et al.,
DEFENDANTS

No. CIV 91-1840 PHX CAM
ORDER

Having considered the defendants' motion for judgment on the pleadings, treated as a motion for summary judgment, the Court concludes as follows:

Background

The following facts are undisputed:[1]

By a lease dated October 7, 1988, Defendant Grace Investment Company leased tribal lands from the Yavapai-Prescott Indian Tribe in Prescott, Arizona to construct and operate a shopping center. SOF 4,7. The Yavapai-Prescott Indian Tribe is a federally recognized and protected Indian Tribe. SOF 4. The lease was entered pursuant and subject to federal laws governing the leasing of Indian lands. SOF 5. There is no provision in the lease which specifically adopts Arizona's mechanics' lien laws, and there has been no express approval by the Secretary of the Interior of the lease. SOF 6. Rather, the lease was approved by the United States Department of Interior, through the Bureau of Indian Affairs, by the acting Phoenix Area Director. SOF 6. The lease

[1] When the Court converted this motion for judgement on the pleadings to a motion for summary judgement, it ordered the parties to file statements of facts. The defendant filed its statement of facts. Plaintiff has not filed a statement of facts. However, it is clear from the pleadings that the few facts relevant to the determination of preemption are undisputed.

Ariz. Const., Art. XX, ¶ 4.

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right of title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Arizona's Mechanics' Lien Law, A.R.S. § 33-981.

A. Except as provided in §§ 33-1002 and 33-1003, every person who labors or furnishes professional services, materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien on such building, structure or improvement for the work or labor done or professional services, materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent.

B. Every contractor, subcontractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent.

C. A person who is required to be licensed as a contractor but who does not hold a valid license as such contractor issued pursuant to title 32, chapter 10[1] shall not have the lien rights provided for in this section.

D. A person required to give preliminary twenty day notice pursuant to § 33-992.01 is entitled to enforce the lien rights provided for in this section only if he has given such notice and has made proof of service pursuant to § 33-992.02.

E. A person who furnishes professional services but who does not hold a valid certificate of registration issued pursuant to title 32, chapter 1,[2] shall not have the lien rights provided for in this section.

F. A person who furnishes professional services is entitled to enforce the lien rights provided for in this section only if such person has a written agreement with the owner of the property or with an architect who has a written agreement with the owner of the property.

25 C.F.R. § 1.4(a) and (b)

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. . .

25 C.F.R. § 162.9

Improvements placed on the leased land shall become the property of the lessor unless specifically excepted therefrom under the terms of the lease. The lease shall specify the maximum time allowed for removal of any improvements so excepted.

25 C.F.R. § 162.12

(a) Except as provided in paragraphs (b), (c), and (d) of this section, a sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties.

(b) With the consent of the Secretary, the lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval. Subleases so made shall not serve to relieve the sublessor from any liability nor diminish any supervisory authority of the Secretary provided for under the approved lease.

(c) With the consent of the Secretary, the lease may contain provisions authorizing the lessee to encumber his leasehold interest in the premises for the purpose of borrowing capital for the development and improvement of the leased premises. The encumbrance instrument must be approved by the Secretary. If a sale or foreclosure under the approved encumbrance occurs and . . . if the purchaser is a party other than the encumbrancer, approval by the Secretary of any assignment will be required, and such purchaser will be bound by the terms of the lease and will assume in writing all the obligations thereunder.

(d) With the consent of the Secretary, leases of tribal land to individual members of the tribe or to tribal housing authorities may contain provisions permitting the assignment of the lease without further consent or approval where a lending institution or an agency of the United States makes, insures or guarantees a loan to an individual member of the tribe or to a tribal housing authority for the purpose of providing funds for the construction of housing for Indians on the leased premises; provided, the leasehold has been pledged as security for the loan and the lender has obtained the leasehold by foreclosure or otherwise. Such leases may with the consent of the Secretary also contain provisions permitting the lessee to assign the lease without further consent or approval.

25 U.S.C. § 415(a)

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educations., recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except . . . leases of land on the . . . . Yavapai-Prescott Community reservation, . . . which may be for a term of not to exceed ninety-nine years and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

28 U.S.C. § 1322(b).

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or Indian Tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 U.S.C. § 1360(b).

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

has a term of 65 years with an option to renew for an additional 20-year period.

After execution of the lease, Grace began construction of the Frontier Village Center. In February of 1991, Grace entered into a subcontract with Tempe Trenching Co., Inc., a non-party to this action, for the construction of onsite and offsite water and sewer systems for Frontier Village Center. In April of 1991, plaintiff Red Mountain Machinery rented equipment to Tempe Trenching. That machinery was used by Tempe Trenching to carry out its subcontract with Grace on the Frontier Village project.

On September 11, 1991, when Tempe Trenching failed to pay the entire amount due to Red Mountain, Red Mountain recorded a notice of claim of Lien in the amount of $55,872.14. SOF 8. The lien listed the Tribe as the owner of the real property against which Red Mountain was claiming a lien. SOF 9. The legal description attached to the lien described the real property subject to the lien as the real property leased by Grace from the Tribe. SOF 10.

Procedural Background

On October 22, 1991, Red Mountain filed this action in Yavapai County Superior Court seeking foreclosure of the leasehold interest in the real property leased by Grace from the Tribe. SOF 11. The defendants subsequently removed the action to this court. SOF 12.

Defendants filed a motion for judgment on the pleadings arguing that the Arizona lien law is preempted by the pervasive Federal statutory and regulatory control of leases involving Indian land. Because the Court must consider documents outside of the pleadings, it has converted the motion to a motion for summary judgment. The plaintiff argues that the Arizona lien law is not preempted by federal laws.[2]

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[2] The plaintiff also argues that the defendants have waived or are stopped from asserting any governmental immunity defense. However, as the defendants do not raise the separate defense of governmental immunity, the Court will not consider the merits of plaintiff's argument.

Summary Judgment

Summary judgment may be granted if the movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.

The disputed fact(s) must be material. Id. Substantive law determines which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The dispute must also be genuine. A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Liberty Lobby, 477 U.S. at 249, 106 S.Ct. at 2510. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-250, 106 S.Ct. at 2510-11. In a civil case, the question is:

> whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Liberty Lobby, 477 U.S. at 252, 106 S.Ct. at 2512.

The moving party who has the burden of proof on the issue at trial must establish all of the essential elements of the claim or defense for the court to find that the moving party is entitled to judgment as a matter of law. Fontenot v. Upjohn, 780 F.2d 1190, 1194 (5th Cir. 1986); Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986). However, the moving party need not disprove matters on which the opponent has the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Thus, summary

judgment is proper if the nonmoving party fails to make a showing sufficient to establish the existence of an essential element of his case on which he will bear the burden of proof at trial. Id.

Preemption

The issue in this case is whether the Arizona mechanics' lien statute may be applied to allow foreclosure of a leasehold interest when the lessee is a non-Indian company but the subject of the lease is Indian land or whether the statute is preempted by the pervasive federal regulation of Indian trust lands.

Because of the unique historical origins of tribal sovereignty, the general preemption principles that apply to other areas of the law are inapplicable to the preemption issues regarding Indian tribes. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980). Therefore, the Supreme Court has rejected the proposition that in order to find a particular state law to have been preempted, an express congressional statement to that effect is required. Bracker, 448 U.S. at 144, 100 S.Ct. at 2584.[3] Rather, state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply. Bryan v. Itasca County, Minnesota, 426 U.S. 373, 377, 96 S.Ct. 2102, 2105, 48 L.Ed.2d 710 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71, 93 S.Ct. 1257, 1261, 36 L.Ed.2d 129 (1973). Where the state asserts authority over the conduct of non-Indians engaging in activity on the reservation, the courts must examine the language and policies of the statutes with a particularized inquiry into the nature of the statute, federal, and tribal interests at stake to determine whether the exercise of state authority violates federal law. Bracker, 448 U.S. at 144, 100

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[3] The plaintiff argues that the Arizona law is not preempted because there is no specific mandate from Congress barring applicatio of mechanics' lien laws. However, this argument is without merit. The Supreme Court has rejected the argument that "in order to find a particular state law to have been preemted by operatio of federal law, an express congressional statement to that effect is required." Bracker, 448 U.S. at 144, 100 S.Ct. at 2584 (citing Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 85 S.Ct. 1242, L.Ed.2d (1965).

S.Ct. at 2584. State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interest at stake are sufficient to justify the assertion of state authority. Bracker, 448 U.S. at 145, 100 S.Ct. at 2584. Ambiguities in federal law are generally construed in favor of Indian sovereignty. Bracker, 448 U.S. at 144, 100 S.Ct. at 2584.

Indian lands, including the leasing of those lands, are subject to pervasive federal regulation. See, 25 U.S.C.A. §391, et seq.; 25 C.F.R. §150 et seq. Pursuant to federal regulation, leases of tribal land or land held in trust for the benefit of Indians must be approved by the Secretary of the Interior. 25 C.F.R. § 162 et seq. There is no grant by Congress of general regulatory authority over Indian lands in Arizona or specific grant of authority to impose mechanics' liens upon interests in Indian land. Thus, the state mechanics' lien law, A.R.S.§33-981, et seq., is preempted. Bryan, 426 U.S. at 377, 96 S.Ct. at 2105; McClanahan, 411 U.S. at 170-71, 93 S.Ct. at 1261.

Moreover, the applicable statutes and regulations specifically provide that the states may not encumber the real property of Indian land. Congress has limited states' civil jurisdiction over Indians in both 25 U.S.C.A. §1322 and 28 U.S.C.A. §1360.

28 U.S.C.A. §1360 provides that the listed states[4] have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in Indian country to the same extent that those laws are applicable to private persons or private property. 28 U.S.C.A. §1360(a)(west supp. 1992). Section 1360(b) limits that jurisdiction as follows:

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against

[4] Arizona is not one of the listed states. Id.

alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 U.S.C.A. §1350 (b)(1976).

25 U.S.C.A. §1322 provides:

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property

Nothing in this section shall authorize the

alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property for any interest therein.

25 U.S.C.A. §1322 (a)(b) (1983).

Relevant to the state and local regulation of the use of Indian property, federal regulation provides:

§1.4 State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting zoning or otherwise governing, regulation, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands

all or any part of such laws, ordinances, codes resolutions, rules or any other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property...

25 C.F.R. §1.4 (1992).

The Arizona statute at issue in this action would allow the plaintiff to foreclose on the leasehold interest of the Indian tribe. A.R.S. §33-981, et seq. Such foreclosure would impact on the possession rights of the Indian Land in direct contradiction to the above federal laws and the interest of those laws to prevent encumbrance of the Indian lands by the states.[5] Therefore, the state mechanics' lien law is preempted. Bryan, 426 U.S. at 377, 96 S.Ct. at 2105; McClanahan, 411 U.S. at 170-71, 93 S.Ct. at 1261.

IT IS THEREFORE ORDERED THAT:

(1) The defendants' Motion for judgment on the pleadings, treated as a motion for summary judgment, (DOC 6) is granted. The Clerk of Court shall enter judgment for the defendants.

(2) Oral argument scheduled for September 11, 1992 is vacated.

Dated this _____ day of August, 1992.

C.A. Muecke
U.S. District Judge

[5] Nor is the state interest in this case sufficient to justify application of the mechanics' lien law. Presumably, plaintiff has another less intrusive remedy - a contract action in state court against Tempe Trenching. Such action would not encumber Indian lands.